UNITED STATES SENATE
REPUBLICAN
POLICY COMMITTEE

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Campaign Finance "Reform" at the Supreme Court

Facing the First Amendment

The Senate will vote on the campaign finance "reform" bill (H.R. 2356) today. The bill has passed the House, and most observers believe that it will soon be on the President's desk and that he will sign it. Even after enactment, though, the bill will make another stop, and it is difficult to see how some of its provisions can withstand scrutiny from the Supreme Court.

The bill raises several fundamental constitutional issues, and it will be considered by a Supreme Court that has, just since 1976 and its case of *Buckley v. Valeo*, thrown out more than 45 provisions of Federal law. About 40 percent of those laws were overthrown because they were found to violate the First Amendment. Yet, it is this same Supreme Court that the advocates of H.R. 2356 are counting on to sustain the constitutionality of the bill.

The Supreme Court used the First Amendment to invalidate at least six provisions of the Federal Election Campaign Act. *Buckley v. Valeo*, 424 U.S. 1 (1976); *F.E.C. v. National Conservative Political Action Committee*, 470 U..S. 480 (1985); *F.E.C. v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986); and *Colorado Republican Campaign Committee v. F.E.C.*, 518 U.S. 604 (1996).

In other cases involving political speech under the First Amendment,

- The Court struck down a Federal ban on editorializing by noncommercial educational stations that receive grants from the Corporation for Public Broadcasting. *Federal Communications Commission v. League of Women Voters*, 468 U.S. 364 (1984).

- The Supreme Court struck down a Federal ban on photographic reproductions of currency because the ban contained an exception for "philatelic, numismatic, educational, historical, or newsworthy purposes." *Regan v. Time, Inc.*, 468 U.S. 641 (1984).

- The Court struck down a Federal (District of Columbia) law prohibiting the display of any sign within 500 feet of a foreign embassy if the sign tended to bring the foreign government into "public disrepute." *Boos v. Barry*, 485 U.S. 312 (1988).

- The Court struck down the Flag Protection Act that made burning the flag a criminal offense. *United States v. Eichman*, 496 U.S. 310 (1990).

- The Court struck down a provision of the Ethics in Government Act that prohibited certain Federal employees from engaging in expressive activity and being paid for it. *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995).

- The Court struck down a funding restriction that prohibited the Legal Services Corporation from participating in litigation that challenges a Federal or state welfare law. *Legal Services Corporation v. Valazquez*, 531 U.S. 533 (2001).

- The Court struck down a Federal law that prohibited disclosure of an illegally intercepted electronic communication, as the law was applied to a talk show host who had obtained the taped conversation legally and then replayed it on the air. *Bartnicki v. Vopper*, 532 U.S. 514 (2001).

In cases involving commercial speech,

- The Supreme Court struck down a Federal law barring from the mails any unsolicited advertisement for contraceptives. *Bolger v. Youngs Drug Products Corp*., 463 U.S. 60 (1983).

- The Court struck down a Federal prohibition on the display of alcohol content on beer labels. *Rubin v. Coors Brewing Co*., 1514 U.S. 476 (1995).

- The Court struck down a section of the Communications Act that prohibited broadcasters from carrying advertisements for privately operated gambling casinos. *Greater New Orleans Broadcasting Assoc. v. United States*, 527 U.S. 173 (1999).

- The Court struck down a provision of Federal law that imposed a mandatory assessment on mushroom handlers to fund generic advertising of mushrooms. *United States v. United Foods, Inc*., 533 U.S. 405 (2001).

And in the area of indecency and obscenity, the Court has struck down several provisions of Federal law. *Sable Communications of California v. F.C.C.*, 492 U.S. 115 (1989); *Denver Area Educational Telecommunications Consortium v. F.C.C.*, 518 U.S. 727 (1996); *Reno v. A.C.L.U. Union*, 521 U.S. 844 (1997); and *United States v. Playboy Entertainment Group*, 529 U.S. 803 (2000).

If the legislative battle is over, the judicial battle has just begun, and the advocates of "reform" face a long list of unfriendly precedents.

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